Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
MCI Telecommunications Co., Inc.	)	
Petition for Expedited Declaratory Ruling Preempting the Arkansas Telecommunications Regulatory Reform Act of 1997 pursuant to Sections 251, 252 and 253 of the Communications Act of 1934, as amended.	)	*CC Docket No. 97-100*

REPLY COMMENTS OF THE

COMPETITION POLICY INSTITUTE

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SUMMARY

The Arkansas Telecommunications Regulatory Reform Act (Arkansas Act) is one of the most anti-consumer and anticompetitive statutes in the country. Rather than defending the merits of the legislation, the parties opposing preemption of the Arkansas Act raise a number of legal and procedural arguments against preemption. These commenters, however, cannot explain away one simple fact -- several provisions of the Arkansas Act directly conflict with the language of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Federal Act). The Federal Communications Commission (FCC) must preempt these provisions of the Arkansas statute if the Federal Act is to have any effect on opening the local telephone market to competition.

The opponents of preemption argue that neither ACSI nor MCI have demonstrated any harm from the Arkansas law and thus do not have "standing" to request preemption. They maintain that, until the Arkansas Act has been interpreted by the PSC and the courts, it is impossible to know whether the Arkansas Act imposes a prohibited barrier to entry.

While this argument may be relevant for certain ambiguous provisions of the Arkansas Act, other provisions of the Arkansas Act are so explicitly inconsistent with the Federal Act that there is no possible way that they could be interpretated consistent with the Federal Act. Further, section 253(a) bans any state regulation or law that "may" have the effect of prohibiting "any" telecommunications service. Thus, the statutory language allows the FCC to make predictive judgments about the future effect of a regulation and requires preemption if even a single service is effectively prohibited.

Three provisions of the Arkansas Act directly conflict with the Federal Act and are likely to prevent an entity from providing telecommunications service: 1) the ban on reselling promotional discounts; 2) the ban on CLECs obtaining universal service support in rural areas, and 3) the ban on municipalities providing service. These three provisions must be preempted in order to carry out the intention of Congress and to give effect to the Federal Act. Preemption of these three provisions is necessary to allow consumers to realize the benefits of local telephone competition as quickly as possible.

REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

I. INTRODUCTION

The Competition Policy Institute (CPI) hereby submits these reply comments on the Petition for Expedited Declaratory Ruling filed by MCI on June 3, 1997.[1] *CPI is an independent, non-profit organization that advocates state and federal policies to promote competition for telecommunications and energy services in ways that benefit consumers. CPI believes that competition will lead to lower prices, greater infrastructure development, new services, and more choices for consumers of telecommunications services.*

The Arkansas Act is one of the most anti-competitive and anti-consumer statutes in the country. The Arkansas Act blatantly discriminates against new entrants and favors the incumbent local telephone companies. The Arkansas Act deregulates rates for monopoly telephone services, provides incumbent local telephone companies with a guaranteed revenue stream, establishes a preference that ILECs but not CLECs will qualify for universal service funding, requires unbundled elements to be priced based upon embedded costs, and permanently exempts rural telephone companies from unbundling their local networks.

As CPI pointed out in its initial comments, however, the FCC is not permitted to preempt state legislation simply because it enforces bad public policy. The FCC 's authority to preempt is limited by the Communications Act and by Supreme Court precedent. The parties opposing

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[1]Comments were requested by the FCC pursuant to the Public Notice issued June 6, 1997 (DA 97-1190).

MCI's Petition for Expedited Declaratory Ruling[2] *raise a host of legal and procedural arguments against preemption. While some of these arguments may be relevant and should be fully considered, three provisions of the Arkansas Act are so directly and explicitly in conflict with the Federal Act that no amount of legal maneurvering can shield them from preemption.*

These provisions are: 1) Section 9(d) of the Arkansas Act, which denies competing carriers the ability to obtain promotional prices, service packages and temporary discounts for resale; 2) section 5(d), which designates incumbent rural telephone companies as the only carriers eligible for universal service funding from both federal and state universal service funds; and 3) section 9(b), which prohibits any government entity from providing basic local exchange service.

II. PREEMPTION OF CERTAIN PROVISIONS IS ESSENTIAL TO UPHOLD THE INTEGRITY OF THE TELECOMM UNICATIONS ACT OF 1996.

Before addressing the specific arguments against preemption, one important point deserves emphasis -- in at least three cases, the statutory language of the Arkansas Act directly and specifically contradicts the language of the Federal Act. The FCC must preempt at least these three provisions in order to give meaning and effect to the federal language. Preemption of these three provisions is also important for the consumers of Arkansas, who will be denied the benefits of competition if these discriminatory provisions are enforced. Perhaps most important, the Arkansas Act will, if left intact, encourage other state legislatures to follow the lead of the Arkansas General Assembly and also enact state legislation that conflicts with the Federal Act. The integrity and enforceability of the entire Telecommunications Act of 1996 could be

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[2]The parties opposing preemption are the Arkansas Telephone Association (ATA), Southwestern Bell Telephone Company (SWBT), and the Arkansas Attorney General (AAG).

jeopardized. Unless the FCC acts to preempt, local telephone competition will be delayed and consumers across the country will be denied the benefits of lower rates, more efficient technology, and higher service quality.

III. THE FCC HAS THE AUTHORITY TO PREEMPT PROVISIONS OF THE ARKANSAS ACT TODAY.

The parties opposing preemption focus most of their attention on procedural arguments against any preemption. To summarize, the parties raise the following issues in arguing that any preemption is premature:

a) Preemption must await adoption of rules by the Arkansas PSC. (ATA, p.4)

b) Preemption must await rulings from the Arkansas courts interpreting the Arkansas Act. (ATA, p. 4)

c) Preemption must await rulings from the federal courts interpreting the FCC's responsibilities under the Federal Act. (ATA, p. 5)

d) The FCC has no authority to preempt rules concerning intrastate communications because of section 2(b) and the Commerce Clause. (ATA, p. 5; AAG, p.5)

e) Neither MCI nor ACSI has established that any provision of the Arkansas Act will prohibit or have the effect of prohibiting any service. (ATA, p. 9)

f) MCI has not shown, or even alleged, that is has suffered an injury in fact that is fairly traceable to the Arkansas Act, so MCI has no "standing" to challenge the Arkansas law. (AAG, p.4)

g) The Federal Act violates the Tenth Amendment because it improperly imposes duties on state officials. (AAG, p. 6)

h) MCI's "facial challenge" to the statute requires it to demonstrate that there is no possible way for the Arkansas Act to be applied in a manner that would be consistent with the Federal Act, which MCI has not even tried to do. (SWBT, p.2)

The following discussion responds to each of these arguments.

A. The FCC Does Not Need to Wait for Further Judicial Review of the Arkansas Act

or the Federal Act Before Exercising Its Authority to Preempt. (Response to arguments (b) and (c).

These first three arguments ask the FCC to delay any ruling on preemption until the Arkansas PSC has issued its rules, the state courts have interpreted the Arkansas Act, and the federal courts have interpreted the Federal Act. With regard to the second and third arguments[3]*, the suggestion that the FCC should withhold on any preemption action pending judicial review is absurd. It will take years before every provision of the Arkansas Act and the Federal Act are interpreted definitively. As we have already seen, challenges to the Telecommunications Act of 1996 have been raised in many courts around the country at the disctrict court and appellate court leve. It has taken five years for principal appeals of the 1992 Cable Act to be completed. Because the Telecommunications Act is even more complex than the 1992 Cable Act, it is likely to take even longer than five years to resolve many of the legal issues surrounding the Telecommunications Act.*

Furthermore, the suggestion that the FCC should await further guidance from the courts ignores the fact that the FCC is the principal agency responsible for administering and enforcing the Federal Act. In fact, the policy of the courts is to show deference to the interpretations of the federal agencies who have the expertise in interpreting the federal law. In addition, courts generally require litigants to exhaust their administrative remedies before going to court. Most often, an issue only becomes ripe for judicial review after the FCC has taken action to enforce the law.

In essence, these commenters suggest that the FCC should wait for local competitors to

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[3]The first of these three arguments is discussed below.

apply for and receive state and municipal authority to enter a market, develop a business plan begin to construct a telecommunications network, request interconnection from the ILEC, await a ruling from the state PSC concerning an arbitration request or approval of a negotiated agreement, appeal the ruling of the PSC, and await a court ruling before knowing whether the Arkansas Act poses a sufficient conflict with the Federal Act to file a preemption petition with the FCC. The uncertainty created by this lengthy process alone is likely to discourage competitors from investing in the Arkansas market. Competitors are simply more likely to bypass Arkansas altogether rather than spend money to compete in a market that could end up being closed to them.

As a result, the procedural schedule advanced by the incumbent telephone companies in this proceeding will have the exact substantive outcome they desire -- no local competitors will seek to compete in Arkansas. To follow the suggestions of these commenters would give effect to the old adage "justice delayed is justice denied."

B. The FCC has the Authority to Preempt Intrastate Barriers to Entry that Conflict Directly with the Federal Act. (Response to argument (d))

The commenters opposing preemption raise the "intrastate" issue as reason to discourage the FCC from preempting the Arkansas statute. While the FCC's general authority over intrastate issues may be proscribed, the law recognizes that the FCC does have preemption authority in cases such as these.

First, section 253(a) specifically preempts state and local statutes that prohibit or have the effect of prohibiting "any interstate or intrastate telecommunications service." The specific language of that section vests the FCC with authority to preempt barriers to competition for

intrastate services. The Supreme Court, in the Louisiana decision, specifically recognized that the general presumption against FCC authority over intrastate services can be overcome by a specific grant of authority.

Second, even if the Federal Act does not expressly grant the FCC the authority to preempt, the FCC has preemption authority arising out of the general preemption principle that forbids a state statute from overriding or interfering with federal law. As SWBT points out in its comments, "preemption may occur when there is outright or actual conflict between federal and state law, where inconsistent state regulation negates valid federal goals, or where compliance with both federal and state law is not possible as a practical matter." [footnotes omitted]. (SWBT, p. 2) Where, as here, the state statute conflicts with the federal statute (as opposed to the FCC's rules interpreting the statute), the case for preemption is strong.

C. The Petitioners Do Not Need to Show Injury in Fact in order to Establish a Basis for Preemption.(Response to arguments (e) and (f))

The commenters opposing preemption also maintain that MCI and ACSI must demonstrate, as a factual matter, that the Arkansas statute has prevented them from offering a particular service. Since neither MCI nor ACSI has demonstrated that they have not been able to offer a service, the argument goes, neither MCI nor ACSI have stated a claim for relief under section 253.

Of course, it is difficult, if not impossible, to prove a negative. To satisfy this line of reasoning, MCI or ACSI would have to show that it had begun to offer a service and then, because of the Arkansas Act, were effectively barred from offering that service any longer. This requirement is unreasonable. No carrier will begin to offer a service knowing that it suffers the

risk that the service will later be barred. The commenters opposing preemption are, in effect, arguing that potential competitors would have to undertake the risk that their investments would be stranded and that the carrier would lose goodwill with potential customers whose service was interrupted.

For this reason, section 253 does not require the form of showing suggested by the commenters opposing preemption. Instead, the language of section 253(a) states that no state or local statute "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This language does not require the service to have been interrupted in the past. The standard is, in this sense, forward-looking. It allows the FCC to make predictive judgments as to the likelihood that a particular statute or other legal requirement will prohibit or have the effect of prohibiting a service in the future.

In attempting to defuse the argument of MCI on this point, the comments of SWBT instead reinforce MCI's argument. SWBT states that, in order to meet the requirements of section 253(a), a party must "demonstrate that a particular law when applied in a particular case actually would have the effect of prohibiting the provision of a telecommunications service." (SWBT, p. 2) In other words, SWBT acknowledges that MCI does not need to show past harm; MCI needs only to show that the statute would, if enforced in the future, have the effect of preventing a service.

Further, MCI and ACSI do not need to show that the statute or regulation would prevent them from entering the market entirely. The provision in section 253(a) allows the FCC to preempt a state statute or regulation that effectively prohibits "any" service. Thus, all MCI and ACSI need to demonstrate is that a single service would be barred by the Arkansas Act.

Again, even if secton 253 does not grant the FCC specific authority to preempt, general preemption law allows the FCC to preempt based upon a direct conflict with federal law. Under this approach, no showing of "harm" or "injury" is necessary. A direct conflict between the state statute and federal statute is sufficient to satisfy the need for preemption.

D. The Tenth Amendment is Irrelevant to the FCC's Preemption Authority. (Response to argument (g)).

The argument that the FCC cannot preempt because the Telecommunications Act may violate the 10th Amendment is irrelevant. Furthermore, the argument proves too much.

The AAG appears to question whether the FCC has the power to preempt at all because, in Prinz v. United States,[4] the Supreme Court invalidated sections of the Brady Bill for imposing duties on state officials that exceeded Congress' authority. The question raised by the AAG does not apply to this case. According to the AAG's comments, the "Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers, . . . to administer or enforce a federal regulatory program." But, in this case, the FCC would neither be directing a state to address a particular problem nor commanding the state to administer a federal regulatory program. The FCC would simply be preempting a state regulation that prevents an entity from providing telecommunications services.

Furthermore, the AAG's argument suggests that the FCC has no constitutional power to preempt state regulation in any circumstance. Such an extreme position has no support in the law. While the FCC's preemptive authority may be subject to some limits, the courts have frequently upheld the FCC's right to preempt in certain circumstances.

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[4] 1997 WL 351180 (U.S.)

E. The Parties Opposing Preemption Are Correct that the FCC Should Only Preempt those Provisions that Cannot be Interpreted in a Manner Consistent with the Federal Law. (Response to arguments (a) and (h)).

The parties opposing preemption are correct on one point. The FCC should exercise its preemption authority ony when there is a direct and specific conflict with the Federal Act. As we stated in our initial comments, several of the provisions of the Arkansas Act may or may not conflict with the Federal Act depending upon how they are enforced. Whether these provisions pose a direct conflict with the Federal Act and whether they would have the effect of preventing a service from being offered cannot yet be determined until the Arkansas PSC adopts rules or issues decisions in particular arbitrations.

Three provisions of the Arkansas Act, however, pose such a direct conflict with the Federal Act that there is no way to interpret or enforce them in a manner consistent with the Federal Act. The commenters opposing preemption insist that preemption of these three provisions should await enforcement by the Arkansas PSC or the courts. As the ATA suggests, however, the only manner in which these provisions can be interpreted consistently with the Federal Act is to "delete[] and disregard[]" them. (ATA Comments, p. 12) In this case, FCC preemption will remove an uncertainty, provide clarity to courts, regulators and businesses, and help to speed service to consumers.

IV. THE COMMENTERS OPPOSING PREEMPTION DO NOT SUGGEST ANY WAY TO INTERPRET THE THREE PROVISIONS CONSISTENT WITH FEDERAL LAW.

A. The FCC must preempt section 9(d).

Section 9(d) prohibits promotional offerings and temporary discounts from being offered for resale. This provision conflicts directly with section 251(c)(4) of the Communications Act,

which requires incumbent local exchange carriers to make retail services available for resale at wholesale rates.

The parties opposing preemption do not propose any possible interpretation of this provision that is consistent with the Federal Act. The AAG simply suggests that the Arkansas PSC may ignore the Arkansas Act and find almost all resale restrictions to be presumptively unreasonable. (AAG Comments, p. 15) Similarly, SWBT does not suggest any interpretation of this provision that could be consistent with the Federal Act. SWBT merely offers that MCI has not shown that it has been denied any ability to provide any particular service. The ATA reiterates the general language in the Arkansas Act that the provision must be enforced as "required by the Federal Act." Even though this phrase is located in a different sentence than the one containing the resale prohibition, the ATA suggests that the Arkansas PSC will interpret the exception consistently with the Federal Act. The ATA attempts, but fails, to provide a potential interpretation. The ATA suggests that promotional prices could be defined as prices that are in effect only a certain period of time that is consistent with federal requirements." (ATA Comments p. 15-16)

If, as these commenters argue, this exception for promotional discount must be interpreted consistent with federal requirements, then the Arkansas Act effectively has no effect at all. Thus, there is no reason for the FCC not to preempt.

B. The FCC Must Preempt Section 5(d).

Section 5(d) states that the incumbent local exchance carrier shall be the only recipient of universal service funds in rural areas. This provision applies to both the federal and the state universal service funds. Federal law, however, specifically directs states to adopt policies that

are competitively neutral. This blatantly discriminatory provision of the Arkansas Act must be preempted.

The commenters opposing preemption make policy arguments and broad assertions to justify this provision. The ATA, for instance, states that the decision to have only one eligible telecommunications carrier (ETC) in a rural area is "reasonable" because Arkansas is a very rural state. (ATA Comments, p. 26) The AAG simply reiterates the same argument that preemption must await enforcement by the Arkansas PSC. SWBT appears to ignore the rural issue by focusing on the provisions concerning the designation of an ETC in non-rural areas.

None of these responses is sufficient to overcome the law. The U.S. Congress and the President made a determination that carriers could be eligible for universal service support in rural areas under certain conditions. The Arkansas Act ignores the federal law and designates the existing monopoly as the permanent and sole beneficiary of universal service funds. Furthermore, the Arkansas designates this one entity as the only entity to receive support from both the federal and the state funds. This provision must be preempted.

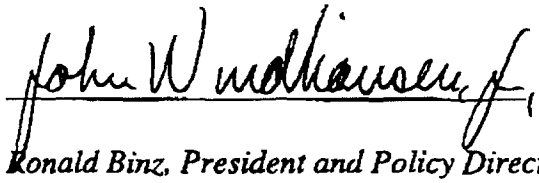
C. *The FCC Must Preempt Section 9(b).*

Section 9(b) prohibits any municipally-owned entity from providing telecommunications services. This provision is in direct conflict with section 253 which bans such explicit prohibitions. Since this issue was raised for the first time in this proceeding in CPI's initial comments, this topic was not addressed by commenters opposing preemption in their initial comments. CPI reserves the right to respond to the arguments against preempting this provision in further ex parte communications with the FCC.

V. CONCLUSION

The FCC should preempt the three provisions of the Arkansas Act identified above because they directly conflict with federal law and serve as barriers to entry under sections 253(a) and (d).

Respectfully Submitted,



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